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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 60

SEA VIEW, INC., ET AL,

Petitioners,

versus

M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,

Respondents.

BRIEF OF RESPONDENTS, M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN, IN OPPOSITION TO THE PETITION OF SEA VIEW, INC., ET AL, FOR WRIT OF CERTIORARI.

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May It Please the Court:

The Short statement of the facts in the Petitioners' Brief is generally fair to both parties except that it fails to show that the testimony of the witness Weinstein, taken at the request of the Petitioners, showed without question the loss of at least $26,000.00 of money by gambling with the Defendants in the Court below, the Petitioners here.

ARGUMENT.

I.

THE UNITED STATES CIRCUIT COURT OF APPEALS WAS NOT ACTING IN OPPOSITION TO ANY STATUTE LAW OR DECISION OF THE SUPREME COURT OF MISSISSIPPI IN RULING THAT THE 6 YEARS STATUTE OF LIMITATION WAS APPLICABLE.

While the question as to whether or not the gambling laws of the State of Mississippi were penal or not has several times reached the Supreme Court of Mississippi, there has not yet been decided any case by that Court as to when or how suit should be brought, that is as to whether or not the three or six year Statute of Limitation would govern.

The question of Limitations of Actions in Mississippi is governed entirely by the statutes set forth in Chapter 2, Title 6 of the *Mississippi Code of 1942;* and after setting forth the limitation of the right to sue in almost all conceivable circumstances, the statutes finally in Section 722, *Mississippi Code of 1942*, recite a 6 year statute of limitation which is to be applied to all cases not covered by any special Statute of Limitations set forth in the chapter on Limitations of Actions above cited. (Appendix).

We do however have an analogous case, in which the Supreme Court of Mississippi held that the 6 years Statute of Limitations applied, being the case of *Rather v. Moore*, 179 Mississippi 78, 173 So. 664, which was an ac-

tion by the Receiver of an insolvent bank against stockholders for their double liability imposed by Section 3815, *Code of Mississippi of 1930*. The highest Court of Mississippi examined this Section very carefully and after deep study of the contention that the 3 years statute of limitations applied, held that the 6 years Statute of Limitation applied. We especially call the Court's attention to the specially concurring opinion of Chief Justice Smith in the above case and of the long and distinguished service of Judge Smith on the Bench of Mississippi. This case has been cited with approval in *Seward v. Dogan* (Miss., 1944) 20 So. (2d) 89. We also call to the Court's attention the authorities cited by Judge Hutcheson in his opinion in the Court below (Record 93-98) as this opinion fully shows that the conclusion reached was thoroughly supported by the decisions of the Supreme Court and the Statute Laws of the State of Mississippi.

II.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE STATUTE ON WHICH THIS SUIT WAS BASED WAS REMEDIAL RATHER THAN PENAL.

At the risk of prolixity we want to call to the Court's attention that the Mississippi Statute on gambling (Appendix), that is, on the right of the loser and his family to recover is not a new statute, but on the contrary is set forth as Chapter 60 on Page 320 of the *Poindexter Code of Mississippi*, published in 1824. It has since then been brought down in some form or other in every codification of the laws of Mississippi, and it has existed in its present

form for over 75 years. Therefore, the law is a part of the public policy of Mississippi intended to remedy a very dangerous situation prevailing in an early part of the State's history. Its very purpose or intent is remedial in effect; and in order that this would be brought forcibly to the attention of the Courts the Legislature of Mississippi in the year 1857, now brought forward by Chapter 2202 of the *Mississippi Code of 1942*, provided that "all Laws made or to be made for the purpose of gambling or gaming are remedial and not penal statutes and shall be so construed by the Courts." This provision of the law was upheld in *Seal v. State*, 13 Smedes and Marshal 286; *Kain v. State*, 13 Smedes and Marshall 456; *Skinner Mfg. Co. v. Deposit Bank*, 160 Miss. 815, 133 So. 660.

There is therefore a long and consistent holding by the Highest Court of Mississippi that gambling laws of all types were remedial, and accordingly the Court has approved the statement of construction announced by the State Legislature. See *Motlow v. Johnson*, 151 Alabama 276, 44 So. 42, a decision of an adjoining State having the same history, philosophy of laws, and general moral purposes as was attempted to be preserved by the laws of our own state. While we know that the mere designation by a Legislature of an act as remedial rather than penal does not always make the law a remedial law rather than a penal law, nevertheless, where for over a hundred years it has been the purpose of the law makers of the State to preserve and prohibit the innocent from the vicious attack of the gamblers and their cohorts such an interpretative enactment would be given the utmost consideration. And where the purposes and facts so warranted the law would

be considered remedial; and certainly in the case at bar where the two minor children through their guardian seek to recover no penalty from the Defendants but only the recovery of money lost by their father in pursuing his lust and desire to gamble, a weakness which had been so freely aided and assisted by the owners of this large gambling establishment who are Petitioners herein, as was said by Justice Dowdell in *Motlow v. Johnson*, 151 Ala. 276, 44 So. 42, "he is not required to part with that which belonged to him, but to return to the Plaintiff that which he received from the Plaintiff without consideration."

III.

THE CIRCUIT COURT OF APPEALS DID COMMIT NO ERROR IN HOLDING THAT THE ACTION GIVEN BY THIS STATUTE WAS NOT JOINT.

In the cases cited by the Petitioner, *Tipping v. Coleman*, 61 Miss. 516, *Jordan v. McKenzie*, 30 Miss. 32, *Anding v. Davis*, 38 Miss. 574, the Supreme Court long ago held that the bar of the Statute of Limitations against one of several jointly interested persons did bar the remaining persons in interest. However, this rule was so inequitable and unfair under certain circumstances that the Legislature, as was its right under the Constitution, sometime prior to the adoption of the *Mississippi Code of 1906* provided as follows:

> "750—Bar of Statute of Limitations against one does not affect another. Jointly interested.—In all cases where the interests are joint, one shall not be barred because another jointly interested is,

but the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested."

The basis of law set forth in the cases cited in Paragraph 2, Page 8 of the Petitioners brief are no longer legal authority in Mississippi, having been superseded by a valid statutory enactment, above. Therefore, even though the Circuit Court of Appeals had not very properly decided that the 6 years statute of limitations applied, it most assuredly would have held that the Plaintiff in the District Court below came within the protection of Section 738 of the *Mississippi Code of 1942* (Appendix) which provides that the Statute of Limitations in this as well as other cases would be tolled during the period of the infancy of the minors, this being a personal action, as has been held in so many cases, particularly in *Motlow v. Johnson, supra.* The Circuit Court of Appeals had no reason to go any further into this question having appropriately decided that under authority of the decisions of the highest Court of Mississippi, this cause of action would come within the provisions of the Statute giving 6 years in which suit could be filed. We shall not bring to the Court's attention, as we do not think we are called upon to answer, the allegations of the Petitioners, with reference to jurisdiction. However, we do not think that any of the allegations of the Petition set out the requirements that are mentioned under Rule 38 of this Court.

In conclusion we want to call to the Court's attention that the Appendix to the Petition or Brief of the Petitioners attempts to show 4 sections of the *Mississippi Code of 1942* in such a manner as to render an impression that they are of the same subject matter or belonging to the same class. However, Section 24 is found in the Chapter on Gambling and is totally disassociated from Sections 731 and 729 which are among the many sections which make up the Chapter of Limitations of Actions.

For the reasons above we respectfully submit that the Petition should be dismissed.

Respectfully submitted,

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APPENDIX.

FROM MISSISSIPPI CODE OF 1942:

Title 2, Chapter 1.

"22. Utterly void.—Contracts, judgments, securities, conveyances made, given, granted, or executed, where the whole or any part of the consideration or foundation thereof shall be for money, or any valuable thing won, lost or bet at any game or games, or on any horse-race, cock-fight, or at any other sport, amusement, or pastime, or on any wager whatever, or for the reimbursing or repaying any money knowingly lent or advanced for the purpose of such gaming or gambling, or to be wagered on any game, play, horse-race, cock-fight, or on any sport, amusement, pastime, or wager, shall be utterly void."

"23. Transfer of property to secure or pay, inures to wife and children of loser.—Any sale, mortgage, transfer, or conveyance of any estate, real or personal, to any person or to another for his use or benefit, or in any manner to satisfy or secure money or other thing won, or any part thereof, or to secure or satisfy any money or other thing lent or advanced on any consideration, foundation, or purpose mentioned in the last section, or any part thereof, shall inure to and vest in the wife and children of said mortgagor, seller, vendor, bar-

gainor, or lessor, the whole estate, title and interest of such person sold, mortgaged, bargained, transferred, or conveyed, as though such person had died intestate. And the parties to any action founded on any contract or transaction within this chapter, shall be compelled to answer any bill of discovery touching the same."

"24. Loser may sue and recover money or property lost.—If any person, by playing at any game whatever, or by betting on the sides or hands of such as do play at any game, or by betting on any horse-race or cock-fight, or at any other sport or pastime, or by any wager whatever, shall lose any money, property, or other valuable thing, real or personal, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, or his wife, or children, may sue for and recover such money, property, or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, with costs: Provided that this and the two preceding sections shall not apply to contracts for future delivery which are valid under succeeding sections of this chapter."

Title 6, Chapter 2:

"722. Actions to be brought in six years.—All actions for which no other period of limitation is pre-

scribed shall be commenced within six years next after the cause of such action accrued, and not after."

"729. Actions to be brought in three years.—Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

"731. Action for penalty commenced in one year.—All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after."

"738. Saving in favor of those under disabilities.—If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring actions within the times in this chapter respectively limited, after his disability shall be removed; but the saving in favor of persons under disability or unsoundness of mind shall never extend longer than twenty-one years."

"750. Bar of statute of limitations against one does not affect another. Jointly interested.—In all

cases where the interests are joint, one shall not be barred because another jointly interested is, but the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested."

Title 11, Chapter 1:

"2202—Gambling—laws remedial, not penal.— All laws made or to be made for the suppression of gambling or gaming, are remedial and not penal statutes, and shall be so construed by the courts."